Hock Seng Construsction Sdn Bhd & Anor v Yeoh Poh Owi & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–02–610 OF 2000

SHAIK DAUD, ABDUL HAMID MOHAMAD AND ADBUL KADIR SULAIMAN JJCA

20 JUNE 2001

Civil Procedure *— Appeal — Record of appeal — Extension of time — Filing of supplementary record of appeal — Undue delay — Whether sufficient reason to warrant extension — Whether grave injustice to dismiss appeal without hearing merits*

The respondents filed a writ of summons in the Ipoh High Court against the appellants for vacant possession of the property known as HS (D) 3761 Lot 16185 and consequential orders, a claim which arose from a sale and purchase agreement executed on 15 September 1992, between the respondents and the appellants. On 13 March 2001, the appellants filed a notice of motion for an order that they be granted an extension of time to file supplementary records of appeal to include the evidence of the first respondent. Counsel for the respondent objected to this on the ground that there was undue delay in applying for the extension and that no explanation was given for it. He submitted that there was insufficient material placed before the court to allow the extension of time. The learned High Court judge ruled in the respondents' favour and the appellant appealed.

Held, striking off the appeal with costs:

(1) (Per **Shaik Daud JCA**, **Abdul Kadir Sulaiman JCA** concurring) There was insufficient material placed before the court to warrant the exercise of discretion to allow for the extension of time. No reasons was advanced by the applicant in the affidavit in support of the application. The application for extension was devoid of any merit. Therefore the notice of motion was dismissed. As for the appeal proper, in the light of the dismissal of the motion, no proper records of appeal was before the court. The court was in no position to proceed with the appeal with the defective records (see p 494F–H).

(2) (Per **Abdul Hamid Mohamad JCA** dissenting) The main function of the court is to do justice not just to dispose of cases. At times it is unjust to dismiss an appeal without even hearing the arguments on merits purely on the ground that due to the mistake of a solicitor, something that should have been done is not done. In this case, where the appeal record was filed within time, where only two and a half pages of the evidence of the respondent's witness was not recorded by the trial judge (as it was tendered as a 'witness statement', a recent practice) and therefore not in the notes of evidence supplied by the court and was not included, where counsel for the respondent himself had asked for

the appeal to be adjourned for two days to allow counsel for the appellant to file his notice of motion, and the notice of motion was filed, the court should exercise its discretion to allow the application and then proceed to hear the appeal on merits. To dismiss it and consequently to dismiss the appeal on the ground that there was no proper record of appeal before the court without even hearing the arguments on merits was a grave injustice (see pp 497C, I–498B).

[**Bahasa Malaysia summary**

Responden-responden telah memfailkan writ saman di Mahkamah Tinggi Ipoh terhadap perayu-perayu untuk milikan kosong hartanah dikenali sebagai HS (D) 3761 Lot 16185 dan perintah-perintah berbangkit, satu tuntutan yang timbul daripada perjanjian jual beli yang disempurnakan pada 15 September 1992, antara responden-responden dan perayu-perayu. Pada 13 Mac 2001, perayu-perayu telah memfailkan satu notis usul untuk satu perintah bahawa mereka diberikan satu lanjutan masa untuk memfailkan rekod-rekod tambahan rayuan agar dimasukkan keterangan responden pertama. Peguam bagi pihak responden membantah atas alasan bahawa terdapat kelewatan dalam memohon lanjutan tersebut dan tiada penjelasan telah diberikan. Beliau menghujahkan bahawa terdapat material yang tidak mencukupi yang dikemukakan di hadapan mahkamah untuk membenarkan lanjutan masa tersebut. Hakim Mahkamah Tinggi yang arif telah memerintahkan menyebelahi pihak responden-responden dan perayu telah membuat rayuan.

Diputuskan, membatalkan rayuan tersebut dengan kos:

(1) (Oleh **Shaik Daud HMR, Abdul Kadir Sulaiman HMR** bersetuju) Wujud material yang tidak mencukupi yang dikemukakan di hadapan mahkamah untuk mewajarkan penggunakan budi bicara bagi membenarkan lanjutan masa tersebut. Tiada sebab-sebab yang telah dikemukakan oleh pemohon di dalam afidavit sokongan permohonan tersebut. Permohonan untuk lanjutan tersebut tidak mempunyai apa-apa merit. Oleh itu notis usul tersebut telah ditolak. Berhubung rayuan tersebut sendiri, berdasarkan penolakan usul tersebut, tiada rekod-rekod rayuan yang betul dihadapkan ke mahkamah. Mahkamah tidak di dalam kedudukan untuk meneruskan rayuan dengan rekod-rekod defektif tersebut (lihat ms 494F–H).

(2) (Oleh **Abdul Hamid Mohamad HMR** menentang) Fungsi utama mahkamah adalah untuk melakukan keadilan dan bukan hanya untuk menyelesaikan kes-kes. Ada masanya adalah tidak adil untuk menolak satu rayuan tanpa mendengarpun hujah-hujah semata-mata atas alasan di mana disebabkan oleh kesilapan seorang peguamcara, sesuatu yang sepatutnya telah dilakukan

tidak dilakukan. Di dalam kes ini, di mana rekod rayuan telah difailkan dalam tempoh masa, di mana hanya dua dan setengah muka surat keterangan saksi responden yang tidak direkodkan oleh hakim perbicaraan (memandangkan ia telah ditenderkan sebagai satu 'pernyataan saksi', satu amalan terkini) dan oleh itu tidak terdapat dalam nota-nota keterangan yang disediakan oleh mahkamah dan tidak dimasukkan, di mana peguam bagi pihak responden sendiri telah memohon rayuan tersebut ditangguhkan untuk dua hari bagi membenarkan peguam bagi pihak perayu memfailkan notis usul beliau, dan notis usul tersebut telah difailkan, mahkamah hendaklah menggunakan budi bicaranya untuk membenarkan permohonan tersebut dan kemudian meneruskan untuk mendengar rayuan tersebut atas merit. Untuk menolaknya dan seterusnya menolak rayuan tersebut atas alasan bahawa tiada rekod rayuan yang betul di hadapan mahkamah tanpa mendengarpun hujah-hujah atas merit adalah satu ketidakadilan yang serius (lihat ms 497C, I–498B).]

Notes

For cases on record of appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

Cases referred to

Gan Hay Chong v Siow Kian Yuh & Anor [1975] 2 MLJ 129 (refd)
Lee Guat Eng v Tan Lian Kim [1985] 2 MLJ 196 (refd)
Sinnathamby & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd)
Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188 (refd)
Tan Siew Peng v OCBC Bank (M) Bhd [1998] 2 MLJ 420 (refd)

Legislation referred to

Federal Court (Civil Appeals) (Transitional) Rules 1963
Rules of the Court of Appeal 1980 rr 18(4), 102, 103
Rules of the High Court 1980 O 2, O 55 r 4(3)

Appeal from: Civil Suit No 22–98 of 1994 (High Court, Ipoh)

Leong Choo Kong (*Leong Sai Hwa* and *Thomas Su* with him) (*CK Leong & Co*) for the appellants.

Gurbachan Singh (*Bachan & Kartar*) for the respondents.

Shaik Daud JCA:. This was an appeal from the decision of the Ipoh High Court whereby the learned judge entered judgment in favour of the respondents. The respondents had filed a writ of summons against the appellants for vacant possession of property known as HS (D) 3761

Lot 16185 and consequential orders. The claim arose from a sale and purchase agreement executed on 15 September 1992 between the respondents and the appellants.

The appellants had filed a notice of motion dated 13 March 2001 for an order that they be granted an extention of time to file supplementary records of appeal, to include evidence which was left out, ie the evidence of the first respondent.

Learned counsel for the respondent objected to the notice of motion on the ground that there was undue delay in applying for the extention and that no explanation was given whatsoever for the delay.

On going through the records of the motion, I find that the learned judge of the High Court gave his decision on 14 August 2000. Notice of appeal was filed on 7 September 2000, and the appeal records were filed and served on 1 December 2000. There was therefore, a delay of some three months over. The affidavit in support of the motion affirmed by the solicitor for the applicant gave no reason whatsoever as to the failure to include the evidence of the first respondent in the appeal records. Merely saying that they had just been made aware of this is no explanation either. Some material ought to have been put before the court to enable the court to exercise its discretion to allow an extention of time. I have always been of the view that a delay per se is not fatal but a delay without a reasonable explanation in my view is fatal. The mistake of the appellant's solicitors did not constitute a sufficient ground for an extention of time, see *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129. The Court of Appeal in *Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420 held:

> The court has power exercisable at its discretion, to extend the time limited for filing or service of any documents or the doing of any act under the Rules of the Court of Appeal 1994 ('the Rules'). It is trite that the burden is upon an applicant who seeks an extention of time to make available sufficient material upon which the court may exercise discretion in his favour.

In the present case, I agree with the submission of the learned counsel for the respondents that there was insufficient material placed before the court to warrant the exercise of discretion to allow for the extention of time. No reasons were advanced by the applicant in the affidavit in support of the application. It is my view that the application for extention of time was devoid of any merit. Therefore, the notice of motion is dismissed with costs.

As for the appeal proper, in the light of the dismissal of the motion above, no proper records of appeal are before the court. Although the draft index to the records of appeal mentions notes of evidence, the notes are missing. The court is in no position to proceed with the appeal with the defective records. It was submitted that evidence of the first plaintiff is vital for the proper hearing of the appeal. Rule 18(4) of the Rules of the Court of Appeal 1980 has therefore not been followed. Therefore, there are no proper records of appeal before the court. The appeal is struck off with costs. We order the deposit to go to account of costs.

Abdul Hamid Mohamad JCA:. This appeal was fixed for hearing during the week beginning on Monday, 12 March 2001. On that day, when the court was fixing the appeals for the week, this appeal was called up. At that stage, Mr Gurbachan Singh, learned counsel for the respondent, informed the court that he had drawn the attention of Mr Leong, learned counsel for the appellant, that a copy of the witness statement of the first respondent was not included in the appeal record. He then asked for the appeal to be heard on 14 March 2001 (ie two days later) to enable Mr Leong to file a notice of motion for leave to file a supplementary record of appeal. Mr Leong agreed. The court adjourned the hearing of the appeal to 14 March 2001, as requested by Mr Gurbachan Singh.

On the next day, 13 March 2001, Mr Leong filed the notice of motion. On 14 March 2001, as scheduled, the court first heard the motion before hearing the appeal.

Mr Gurbachan Singh said he was objecting the motion. Mr Leong appeared surprised. Mr Gurbachan Singh said that he was only giving an opportunity to Mr Leong to file the notice of motion and that he did not say that he would not object to it. That is true, but that was not the impression I got. Anyway, that is quite irrelevant.

The court heard both their arguments. The court, by a majority agreed with Mr Gurbachan Singh's argument and dismissed the motion. I dissented. The court, then, again by the same majority, dismissed the appeal on the ground that there was no proper appeal before the court.

I now give my reasons.

In this case, the notice of appeal was filed on 7 September 2000 and the record of appeal was filed on 1 December 2000. It was not disputed that both were filed within the stipulated time. However, the record of appeal did not include the witness statement of the first respondent, even though the notes of evidence containing the cross examination and the re-examination of the same witness was included. What had happened was that, in accordance with the recently introduced practice, a typewritten witness statement of the first respondent was tendered in court. That witness statement, as usual, contained the evidence in chief of the witness. Again, as usual, the learned judge did not copy it in his notes of evidence. He need not have done so as the whole purpose of the introduction of the practice was to save the judge's time of having to record all the evidence of every witness. The witness was cross examined and re-examined as usual. The learned judge, of course, recorded the evidence given during the cross examination and the re-examination. The learned counsel for the appellant wrote to the High Court to ask for the notes of evidence and the grounds of judgment to enable him to prepare the record of appeal. He received both the grounds of judgment and the notes of evidence. He filed the record of appeal.

What he did not realize was that the notes of evidence did not contain the witness statement of the evidence in chief of the first respondent.

We cannot blame the judge's secretary for not typing the witness statement in the notes of evidence, as she typed what the learned judge had

recorded in his note book. I agree that Mr Leong is not totally blameless. He should have checked whether the first respondent's witness statement was included in the appeal record before filing it.

In the affidavit in support of the motion, the appellant said that his counsel had inadvertently missed out ('tertinggal') the said witness statement when preparing the appeal record. The statement, which is barely two and a half pages in length was attached.

Mr Gurbachan Singh argued that no reason was given for the failure to include the witness statement in the record of appeal. But, in the circumstances of this case, what else can be said? The question is, in the circumstances of this case, should such a mistake justify this court to dismiss the motion and, consequently the appeal, without hearing the appeal on merits?

The former Federal Court had been very strict in granting extensions of time to file notices of appeal under the old Federal Court (Civil Appeals) (Transitional) Rules 1963. That is understandable as the rule required special leave to be obtained. Such cases cannot be relied on in this present application.

Cases concerning applications for extensions of time to file the memorandum of appeal are more relevant. In *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129, an application for extension of time to file the memorandum of appeal and to serve it on the respondent out of time was dismissed.

In *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196, the memorandum of appeal was filed within time but not served within time. The application for extension of time to serve the memorandum of appeal was granted. Hashim Yeop A Sani SCJ (as he then was), delivering the judgment of the court, said 'The court has, in fact, a wide discretion in granting or refusing extension of time under O 55 r 4(3) provided the discretion is properly exercised.'

In *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 199, the Court of Appeal had to consider whether or not to allow: (i) the appellant's application for extension of time to serve the notice of appeal on the respondent; and (ii) the respondent's application to strike out the appeal for want of service of the notice of appeal. The application was dismissed. Gopal Sri Ram JCA, delivering the judgment of the court said at p 194:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But it is not an unprincipled discretion. There must be some relevant evidential material available to us before we may exercise discretion.

In *Sinnathamby & Anor v Lee Chooi Ying* [1997] 1 MLJ 110, an application for extension of time to file the notice of appeal out of time was granted as leave to appeal had already been granted. Mohamed Azmi SCJ pointed out that under the Rules of the Supreme Court 1980, 'special leave' was no longer required.

In *Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420, an application for extension of time to file the record of appeal out of time was dismissed.

But in none of these cases did the issue involve an application for extension of time to file a supplementary record of appeal to include a few pages of the witness' statement to the record of appeal already filed in time.

I am also aware of the practice of the appellate courts in this country to grant leave to appeal, leave to amend the memorandum of appeal, leave to file additional record of appeal when the appeal is called up for hearing where no formal application was made, where justice so requires and then proceed hearing the appeal.

The reason is not difficult to understand: the main function of the court is to do justice, not just to dispose of cases. At times, it is unjust to dismiss an appeal without even hearing the arguments on mertis, purely on the ground that due to the mistake of a solicitor, something that should have been done is not done.

That is why r 102 of the Rules of the Court of Appeal 1994 ('the RCA') is provided. In fact r 103 of the RCA goes further to provide that even when an application is made to set aside proceedings for irregularity, such an application should not be allowed unless it is made within a reasonable time and that the applicant had not taken any fresh steps after he had knowledge of the irregularity. This provision, in substance, is similar to O 2 of the Rules of the High Court 1980 ('the RHC'). Most, if not all, of the irregularities envisaged by r 102 of the RCA and O 2 of the RHC, must necessarily be due to mistakes of solicitors.

Suffian LP in *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 observed:

> The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.
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> In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
>
> But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
>
> This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear*:
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> 'Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.'

In this case, where the appeal record was filed within time, where only two and a half pages of the evidence of the respondent's witness which was not recorded by the trial judge (as it was tendered as a 'witness statement', a

recent practice) and therefore not in the notes of evidence supplied by the court, was not included, where the learned counsel for the respondent himself had asked for the appeal to be adjourned for two days to allow the learned counsel for the appellant to file this notice of motion, and the notice of motion was filed, I think this court should exercise its discretion to allow the application and then proceed to hear the appeal on merits. To dismiss it, and consequently to dismiss the appeal on the ground that there is no proper record of appeal before the court without even hearing the arguments on merits is, to my mind, a grave injustice.

For these reasons I would have allowed the application, and would not have dismissed the appeal without hearing the arguments on merits.

Appeal struck off with costs.

Reported by Jafisah Jaafar